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To: Board of Appeals, USPTO
Fax: 571 273-8300 Telephone: 571 272-2306
From: Michael J. Buchenhorner
Date: December 26, 2006
**Re: Appeal Brief for Application 10/673,848
Attorney Docket Nbr YOR920030484US1**
Number of pages: 16, including cover page

Attached please find an Appeal brief in reply to the Office Action dated June 23, 2006. Please charge the fee to Deposit Account number 50-0510.

Regards,

Michael J. Buchenhorner

**Michael J. Buchenhorner, Esq.
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PTO/SB/21 (07-08)

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TRANSMITTAL FORM	Application Number	10/673,848	
	Filing Date	09/29/2003	
	First Named Inventor	Nick M. Mitchell	
	Art Unit	2129	
	Examiner Name	Wilbert L. Starks	
(to be used for all correspondence after initial filing)		Attorney Docket Number	YOR920030484US1
Total Number of Pages in This Submission			

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant : Nick M. Mitchell Art Unit : 2129
Serial No. : 10/673,848 Examiner : Starks, Wilbert L.
Filed : 09/29/2003
Title : Automated Scalable and Adaptive System for Memory Analysis via the Discovery
of Co-evolving Regions

Mail Stop Appeal Brief - Patents
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BRIEF ON APPEAL

(1) Real Party in Interest

The assignee International Business Machines Corporation is the real party in interest.

(2) Related Appeals and Interferences

None known.

(3) Status of Claims

Claims 1-11 are pending in the case. (See Appendix of Claims.) Claims 1-11 were rejected under 35 U.S.C. §101. All of the pending claims are being appealed.

(4) Status of Amendments

No substantive amendments have been made since the final Office Action dated June 23, 2006.

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(5) Summary of Claimed Subject Matter

Claim 1 recites a method for identifying co-evolving regions in the memory of a target application [page 8, lines 3-4], comprising instructions for: receiving information identifying a set of data structures that are evolving [page 8, line 5]; and classifying the constituents of the data structures based on their likelihood to evolve in a single coherent manner [page 8, lines 6-7].

Claim 10 recites a computer readable medium for identifying co-evolving regions in the memory of a target application [page 8, lines 13-15], comprising instructions for: receiving information identifying a set of data structures that are evolving [page 8, line 5]; and classifying the constituents of the data structures based on their likelihood to evolve in a single coherent manner [page 8, lines 6-7].

Claim 11 recites an information processing system [page 8, lines 16-17], comprising: a processor comprising logic for performing instructions of [page 8, line 17]: identifying a set of data structures that are evolving [page 8, lines 18-19]; and classifying the constituents of the data structures based on their likelihood to evolve in a single coherent manner [page 8, lines 19-20]; and a memory for storing the instructions [page 8, lines 20-21].

(6) Grounds of Rejection to be Reviewed on Appeal

The grounds of rejection to be reviewed on appeal are:

- (1) Whether the Examiner properly rejected claims 1-11 under 35 U.S.C. §101 as being directed to non-statutory subject matter.
- (2) Whether the Examiner properly rejected claims 1-11 under 35 U.S.C. §112, first paragraph.

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(1) Argument

The Examiner improperly rejected claims 1-11 as being directed to non-statutory subject matter.

The Examiner rejected claims 1-11, stating that "none of the claims is limited to practical applications in the technological arts." Final Office Action at page 2. The Examiner now contends that he did not use that argument. However, as quoted above, the Examiner cannot deny that as a ground for rejection.

Claim 1 is quite simply in the process category. Section 101 is a broad statute that defined what *is* patentable, and not what is *not* patentable. The United States Court of Appeals for the Federal Circuit (hereafter called "the Federal Circuit") has noted that the repetitive use of the expansive term "any" in § 101 shows Congress's intent not to place any restrictions on the subject matter for which a patent may be obtained beyond those specifically recited in § 101. *State Street Bank & Trust Co. v. Signature Fin. Group*, 149 F.3d 1368, 47 USPQ2d 1596 (Fed. Cir. 1998), *cert. denied*, U.S., 119 S. Ct. 851 (1999). Moreover, the Supreme Court has acknowledged that Congress intended § 101 to extend to "anything under the sun that is made by man." *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980); *see also Diamond v. Diehr*, 450 U.S. 175, 182 (1981). Thus, it is improper to read limitations into § 101 on the subject matter that may be patented where the legislative history indicates that Congress clearly did not intend such limitations. *See Chakrabarty*, 447 U.S. at 308 ("The Federal Circuit has also cautioned that courts 'should not read into the patent laws limitations and conditions which the legislature has not expressed.'" (citations omitted)). *State Street Bank & Trust Co. v. Signature Fin. Group*, *supra*.

The only judicially-recognized exceptions to the broad rule of patentability are laws of nature, physical phenomena and abstract ideas. *Diamond v. Diehr*, 450 U.S. 175 (1981). The Board of Patent Appeals and Interferences has held that "there is currently no judicially recognized separate 'technological arts test' to determine patent eligible subject matter under §101." Therefore, the Examiner erred in attempting to apply this now discredited ground of rejection.

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The Examiner also based the rejection of the claims as being allegedly directed to abstract ideas. Specifically the Examiner appears to argue that the claims produce no practical result. Quite to the contrary, the Background of the Invention of the subject patent application discusses the problems that the invention was intended to address. The invention claimed in the subject application relates to automatic memory management. See page 1, lines 17-18. This is a real and important area in computing. It is not merely an academic exercise. The claims do not relate to a scientific or mathematical construct. Computer programs create data structures during operation that are required to perform the intended purpose. However, those data structures can have detrimental effects such as unnecessarily consuming memory space that could otherwise be used for other purposes. Memory management keeps areas of memory available for storage and processing. It helps prevent system shutdown and failure. There is no doubt that those are concrete and tangible results.

The Examiner's reliance on *In re Warmerdam*, 33 F.3d 1354, 31 USPQ2d 1754 (Fed. Cir., 1994) and *AT&T Corp. v. Excel Communications Inc.*, 172 F.3d 1579, 50 USPQ2d 1447 (Fed. Cir. 1999) is misplaced. First, *AT&T* reversed the lower court's holding that the claims at issue in that case were invalid on grounds of 35 USC §101. Thus, the court states that "we reverse the district court's judgment of invalidity [on failure to claim statutory subject matter]." That is the holding of *AT&T*. *AT&T* did not hold that any claim was invalid for failure to comply with §101. Therefore, the Examiner's contention that the Federal Circuit validated the use of *Warmerdam* is simply wrong. Even if the *AT&T* court were to say that *Warmerdam* is a valid test such a statement would at most constitute *obiter dicta* which is not binding on other courts or on this Board.

Second, *Warmerdam* represents a case where a data structure was a mathematical algorithm itself or a mathematical construct which constitutes an abstract idea. However, *Warmerdam* did not hold that data structures are *per se* non-statutory. In *Warmerdam* the inventor attempted to preempt the use of a fundamental relationship that any physical object may always be contained within spherical boundaries lines up along the medial access of the object. That is a mathematical construct or a mathematical relationship and that is not the case in the claims under

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appeal here. Appellant's invention relates to processing of data structures. Such data structures are something designed or invented by humans; they do not represent a mathematical relationship or construct. In *Lowry* the Federal Circuit gave patentable weight to the claimed data structure. *A fortiori* the data structure claimed in *Lowry* must be considered as statutory subject matter. As in *In re Lowry*, 32 F. 3d 1579, 32 USPQ2d 1031(Fed.Cir. 1994), Appellant's data structures define functional characteristics of the memory and the claims require specific electronic structural elements which impart a physical organization on the information stored in memory and the data structures provide increased computing efficiency. Appellant does not seek to patent a data model in the abstract. The Examiner cites *Warmerdam* as if it held that data structures are *per se* non-statutory because the data structures were not analyzed other than citing *Warmerdam* and concluding erroneously that the holding in that case controls and mandates a holding of lack of patentable subject matter in this case. *In re Lowry* is inconsistent with that view.

The Examiner did not consider *In re Lowry* and argues that "Lowry is not in any way applicable law to §101 doctrine." Final Office Action at page 15. That argument is disingenuous. Not only is it contrary to the reaction that the United States Patent Office had to the *Lowry* holding when it conceded the *In re Beauregard* case in response to *Lowry* but it is also at odds with the facts of the *Lowry* case. If the data structures in *Lowry* were not statutory subject matter the Examiner must be suggesting that the Federal Circuit gave patentable weight to non-statutory subject matter in the context of sections 102 and 103. In fact, the Federal Circuit did no such thing. The reason that the Board of Appeals gave no patentable weight to the claims in *Lowry* was that it analogized *Lowry's* data structure to printed matter (*Lowry*, 32 F.3d 1582) and the Patent & Trademark Office was of the opinion that printed matter was not patentable subject matter. Appellant is not now contending that the Examiner rejected the claims at issue on the basis of the printer matter doctrine. Therefore, the Federal Circuit would not have given patentable weight to the data structures if it believed that such structures were *per se* unpatentable. The Examiner states that he understands Appellant's affinity for *In re Lowry*. However, it cannot be seriously argued that it has no relevance to the issue on appeal. Clearly, *Lowry* dealt with data structures and it dealt with the "printed matter" test previously used by the PTO in section 101 rejections.

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Moreover, in *Lowry* the PTO Board of Appeals reversed the Examiner's 35 USC §101 rejection so it was not on appeal but the grounds for the rejection were still a live controversy because those grounds were "printed matter" rejection of software related claims. The Federal Circuit reversed the Board of Appeals printed matter rejection. It is illogical to consider that a rejection could be invalid in a section 102 and 103 context yet be valid in the threshold section 101 context. Therefore, the reversal of the section 102 and 103 rejections was relevant to the section 101 issue and should have been considered. Moreover, *Lowry* was decided a mere two weeks after *Warmerdam* and the Federal Circuit was certainly aware of that case. *Lowry* could not overrule *Warmerdam* because *Lowry* was not heard *en banc*. What *Lowry* did establish is that some data structures are not abstract ideas. Appellant contends that where as here the claims do not attempt to preempt all uses of an algorithm those claims comfortably fall within the scope of section 101.

The Examiner further contends that neither *Lowry* nor *AT&T* did not overrule *Warmerdam*. Appellant recognizes that it would require an *en banc* decision to overrule *Warmerdam* and neither the *Lowry* nor *AT&T* cases were heard *en banc*. Appellant does not contend and has never contended that *Lowry* or *AT&T* overruled *Warmerdam* but rather that *Warmerdam* did not rule that all data structures are abstract ideas. Appellant actually contends that the holding in *Lowry* means that data structures *can* be patentable subject matter and that what *Warmerdam* actually held is that data structures that are mere mathematical constructs are abstract ideas. The Examiner made no showing that Appellant's data structures are a mere mathematical construct.

The Examiner attacks a straw man in saying that Appellant argues that manufactures are *per se* statutory. Appellant has not made any such argument. The Board can review the actual arguments made by Appellant in response to the non-final Office Action. It is the Examiner who is trying to apply *Warmerdam* as a *per se* rule of unpatentability. The Examiner reasons that the claims at issue relate to data structures and *Warmerdam* has held that data structures are not patentable subject matter. Appellant's position is really quite straightforward. The first step is finding a category in section 101 for the claimed invention and in the second step the Patent Office bears the burden of showing that the invention fits into one of the judicially created

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exceptions to patentability. The Examiner misapprehended or mischaracterized Appellant's argument on the first step as the complete analysis. The Examiner cannot argue that the second step is met so he creates a straw man and attacks that.

Similarly, the Examiner's reliance on *AT&T* is misplaced. In *AT&T* the Federal Circuit said "Because §101 includes processes as a category of patentable subject matter, the judicially-defined proscription against patenting of a "mathematical algorithm," **to the extent such a proscription still exists, is narrowly limited to mathematical algorithms in the abstract.**" Appellant does not claim a mathematical algorithm in the abstract. Rather, claims 1- 9 relate to methods for identifying co-evolving regions within a memory. Instead of applying *Warmerdam* as the Examiner contends, the *AT&T* court actually held that the claims of the patent at issue were directed at statutory subject matter. Although *AT&T* did not overrule *Warmerdam* it could not have applied it either because it held that the claims were statutory.

The Examiner appears to contend that according to *Warmerdam* the dispositive issue is the usefulness, concreteness, and tangibility of claim limitations. See Final Office Action at page 5. In fact, the language quoted above stated that the issue of whether the claims directly or indirectly recite a mathematical algorithm was not the dispositive issue. *Warmerdam*, 33 F3d at 1360. The court actually said that the dispositive issue was whether the claim is for a process that goes beyond simply manipulating "abstract ideas" or "natural phenomena." The court did not state that a concrete or tangible result was required. In any case, the data structures in Appellant's claims are like those in *Lowry* and do have practical results. The claims are not like those in *Warmerdam*. Appellant does not attempt to preempt a mathematical construct as in *Warmerdam*. The result is as tangible and concrete as the data structures in *Lowry*. The only rationale used by the Examiner is to incorrectly interpret *Warmerdam* as holding that all data structures are abstract ideas.

The Examiner further erred in applying an incorrect standard that uses a probability of abstractness. Thus, at page 5 of the final Office Action the Examiner states "Clearly, a claim for

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manipulation of 'a set of data structures' is provably [sic "probably"] even more abstract (and thereby less limited in practical application) than pure "mathematical algorithms" which the Supreme Court has held are per se nonstatutory ..." [not citing any authority for this proposition] As explained above, the claims at issue are not directed at abstract ideas. The Examiner offered no evidence that manipulation of data structures is abstract. Certainly an unsupported statement that it is probably abstract is not evidence. A statement by the Examiner that the claimed data structures are abstract ideas begs the question and the statement that manipulation of a set of data structures is probably even more abstract than a pure mathematical algorithm does not provide the requisite proof of abstractness that is required of the Examiner.

The requirement to exclude abstractions from the claim is not proper. The Examiner contends that it is a reasonable interpretation of claim to include abstractions if not specifically excluded. The Federal Circuit has held that the claims must be interpreted in light of the specification. "Claims must be read in view of the specification, of which they are a part." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1315 (Fed. Cir. 2005) (*en banc*). Indeed, the specification is "[u]sually . . . dispositive" and "is the single best guide to the meaning of a disputed term." *Id.* The Examiner cannot reasonably expect a negative statement in claims that excludes all conceivable abstractions if nothing in the specification suggests that such abstractions are included.

Manufacture claim 10 was improperly rejected.

Independent claim 10 is a computer readable medium that recites patentable subject matter. First, it is directed to a manufacture classification of patentable subject matter. Second, the Examiner has not shown that the processing of data structures is a mathematical construct as in *Warmerdam*. Appellant contends that the computer readable form of claims fits into one of the categories of patentability and the Examiner has not shown the applicability of any judicial exception for patentability.

Machine claim 10 was improperly rejected.

Independent claim 11 is a claim that falls under the machine category of patentable subject matter under Section 101. Again, the Examiner has not shown that the data structures of the

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claims at issue are directed to a pure mathematical construct. In fact, even in *In Re Warmerdam*, the Federal Circuit stated that "claim 5 is for and is clearly patentable subject matter." *Warmerdam*, 33 F.3d at 1360. Although this statement is dictum it nevertheless indicates that the *Warmerdam* court considered its test to be more flexible than the application by the Examiner in this case.

The claim rejections under 35 USC 112 are improper.

The Examiner rejected claims 1-11 under 35 USC 112, first paragraph because allegedly there is no way Appellant could have disclosed how to practice the *undisclosed* practical application." Appellant disagrees that there are no practical applications for the claims at issue. In fact, Appellant has an extensive discussion on the problems faced by those skilled in the art and how to practice the claimed invention. Other than stating that the claims are not directed to statutory subject matter, the Examiner has not attempted to show any deficiency in the written description.

The Examiner contends that section 101 rejections are claim rejections and not objections to the claims. The rejection on the basis of 35 USC 112, first paragraph stated that Appellant has not disclosed the practical application of the invention. There is no requirement that claims include a recitation of a practical application. The Final Office Action even quotes MPEP where the following is said: "Necessarily, compliance with §112 requires a description of how to use presently useful inventions." Such teachings are in the specification and not in the claims. The burden of proving that the specification does not teach how to use the invention is on the Examiner. *In re Caveney*, 761 F.2d 671 (Fed. Cir. 1985). The Examiner has not met this burden of proof and the rejection should be reversed.


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Respectfully submitted,

Date: December 26, 2006



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Appendix of Claims

1. A method for identifying co-evolving regions in the memory of a target application, comprising: receiving information identifying a set of data structures that are evolving; and classifying the constituents of the data structures based on their likelihood to evolve in a single coherent manner.
2. The method of claim 1 wherein classifying the constituents of the data structures based on their likelihood to evolve in a single coherent manner further comprises determining coherency by similarity of key structural features and data type of the constituents.
3. The method of claim 1 further comprising a qualitative characterization of the co-evolving regions based on their observed evolution.
4. The method of claim 1 further comprising a quantitative characterization of the co-evolving regions based on their observed evolution.
5. The method of claim 3 wherein the qualitative characterization comprises characterizing the regions as exhibiting one of the following growth patterns: monotonic growth, monotonic shrinkage, bounded-size and fixed constituency, and bounded-size and changing constituency.
6. The method of claim 4 wherein the quantitative characterization comprises identifying a subset of the region that indicates region updates; and reporting measures in terms of these subsets over time.
7. The method of claim 1 wherein the step of receiving information comprises receiving information identifying at least one leak root candidate.
8. The method of claim 7 wherein data structures are identified by choosing those leak root candidates whose rank lies above a desired threshold.

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9. The method of claim 2 wherein for every identified data structure the method for classifying further comprises steps of: receiving a plurality of samples of the constituency of that data structure, and computing the region key for each constituent, and classifying constituents based on region key equivalence.

10. A computer readable medium for identifying co-evolving regions in the memory of a target application, comprising instructions for: receiving information identifying a set of data structures that are evolving; and classifying the constituents of the data structures based on their likelihood to evolve in a single coherent manner.

11. An information processing system comprising: a processor comprising logic for performing instructions of: identifying a set of data structures that are evolving; and classifying the constituents of the data structures based on their likelihood to evolve in a single coherent manner; and a memory for storing the instructions.

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Evidence Appendix.

None.

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Related Proceedings Appendix.

There are no related proceedings.